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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 886

JOHN CHULICK,
Petitioner,

v.

NEW YORK CENTRAL RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE NEW YORK STATE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT

BRIEF FOR RESPONDENT IN OPPOSITION

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STATUTE.

Federal Safety Appliance Act 1, 6, 7, 3

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Question Presented

Absent proof of any defect of the coupler of the Delaware, Lackawanna & Western car, specifically pleaded as "the car which caused the injury to the plaintiff", was it error for the Trial Court to refuse to charge either the applicability of the Federal Safety Appliance Act, or the provisions thereof as a standard of care?

Statement

Appellant's amended complaint states in part, and to the extent material:

That on December 11, 1949 plaintiff was pinned between two cars at the Semet-Solvay Plant and sustained serious injuries (R. Page V, Paragraph Third, Complaint).

That the car which caused the injury to the plaintiff was owned by the defendant Delaware, Lackawanna & Western Railroad Company (R. Page V, Paragraph Fourth, Complaint).

That at the time and place of said injury to the plaintiff, *said car* had a defective coupler (R. Page V, Paragraph Fifth, Complaint).

That said cars were furnished by the defendant New York Central Railroad Company (R. Page VII, Paragraph Eighteenth, Complaint).

That the defendant New York Central Railroad Company had the duty of inspecting the cars which it delivered (R. Page VIII, Paragraph Nineteenth, Complaint).

That the defendant New York Central Railroad knew or should have known of the defective condition of *said car* (R. Page VIII, Paragraph Twentieth, Complaint).

Paragraphs Twenty-first, Twenty-second, Twenty-third each refer to "said car" (R. Page VIII).

That the defendant New York Central negligently allowed *said defective car* to be put into or continued in use; that this defendant failed to make or improperly and negligently made inspections of *said car* (R. Page VIII, Paragraph Twenty-fifth, Complaint).

That said defective car and coupling constituted, etc. (R. Page IX, Paragraph Twenty-seventh, Complaint).

(Emphasis has been supplied above.)

Facts

On December 11, 1949 plaintiff was employed as a switchman by Semet-Solvay (R. 85-86).

Semet-Solvay operated its own rail facilities (R. 30; 90).

The plaintiff and his crew had put a string of cars through the scale house, cutting them off one at a time to let them run down an incline, after which the crew began to couple them up in a string, all on Semet-Solvay's tracks (R. 94, 95).

Chulick was injured while between a tank car owned by his employer, Semet-Solvay and a boxcar owned by the Delaware, Lackawanna & Western Railway Company, and while in the course of his employment, attempting to couple up a string of cars (R. 95; 99; 101-3).

The cars failed to couple because the pin would not drop on the coupler of the Semet-Solvay tank car (R. 100).

The coupler on the Delaware, Lackawanna & Western car was locked in a closed position at all times (R. 125), was never seen nor inspected by the plaintiff (R. 125), the cut off lever was not touched or operated (R. 128), the cars' couplers came together properly, but the coupler of the tank car would re-open (R. 130), that everything on the movement worked properly except the coupler on the tank car (R. 133; 206-270).

The testimony of the other factual witnesses may be summarized as to what car or what defect might have been involved:

Charles Dunford, a fellow employee, was not on duty at the time of the accident (R. 23), inspected the Semet-Solvay tank car and the Delaware, Lackawanna & Western boxcar several hours after the accident (R. 36, 38-39), finding no defect whatsoever (R. 39, 48-51).

Cyril McDermott, a fellow employee, engineman of the plaintiff's crew, had no occasion to look at either coupling (R. 149).

Wasco Guize, a fellow employee and the conductor on the job, made no inspection of the cars after the accident (R. 170), but made the coupling thereafter without difficulty (R. 171; 175; 182; 280-285).

Alfred B. Turner, New York Central car inspector, inspected both cars some hours later (R. 192), found a defective handbrake, but testified that the couplers were in good order (R. 217-218), on the Delaware, Lackawanna & Western car, and on the Semet-Solvay tank car, which had worn but proper couplers (R. 223-224).

ARGUMENT

1. The complaint alleges with singular particularity that the car that caused the injuries was a Delaware, Lackawanna & Western car and that it had a defective coupler.

There is no allegation in the complaint that any other car had a defect of any kind.

The complaint contains no general allegation of negligence but is, as noted above, unusually specific, being directed to the Delaware, Lackawanna & Western car only.

The amended complaint upon which the case came to trial was verified by the plaintiff on August 11, 1950 (R. 129).

The plaintiff testified by deposition before trial on December 9, 1952 and at that time swore that the only defect lay in the Semet-Solvay tank car. At the same time he swore that the Delaware, Lackawanna & Western coupler functioned as intended (R. 266-274).

On the trial the plaintiff testified in a manner consistent with his pre-trial testimony and said that he had read over his deposition prior to the trial and that he had made the answers there recorded (R. 128-129).

Summarizing the proof on trial, we find:

That the failure to couple was because the pin did not drop on the coupler of the Semet-Solvay tank car (R. 125).

That the coupler of the Delaware, Lackawanna & Western car was locked in position at all times (R. 125).

That the plaintiff did not inspect the coupler of the Delaware, Lackawanna & Western car (R. 125).

That everything worked properly, except the coupler of the Semet-Solvay tank car (R. 133; 226-274).

That the witness Dunford examined both cars a few hours after the accident and found no defects (R. 36-51).

That the witness McDermott had no occasion to look at the coupler (R. 149).

That the witness Guize made no inspection of the cars but, immediately after the accident, coupled the cars without difficulty (R. 170-182; 280-285).

That the witness Turner examined the cars the same day, some hours later, but no defects in the coupler were found (R. 223-224).

It is respectfully submitted that the plaintiff failed to make out the only cause of action set forth in his complaint, *i.e.* that the car which caused his injury was a Delaware, Lackawanna & Western car which had a defective coupler.

2. A charge concerning the Safety Appliance Act could only have become relevant once there was proof that the Delaware, Lackawanna & Western car had a defective coupler.

There was no such proof. Indeed the proof showed that the Delaware, Lackawanna & Western coupler functioned as intended.

Under these circumstances the provisions of the Safety Appliance Act had nothing to do with this case and were truly irrelevant or immaterial.

Under these circumstances the request was properly refused and the refusal will not support a claim of error.

Under the peculiar circumstances of this case where the plaintiff elected as early as December 9, 1952 to testify in contradiction of the complaint which he had verified some time before, and where 11 years later in May of 1963, plaintiff and his counsel proceeded to trial upon the same complaint, it is respectfully submitted that the question of the applicability of the Safety Appliance Act to the operation in which the plaintiff was engaged at the scene of his accident, or the availability of the Safety Appliance Act as a standard of care, does not come into play.

There is no suggestion in the complaint that any defect other than the coupler of the Delaware, Lackawanna & Western car was the subject of the action.

There was no testimony critical of the Delaware, Lackawanna & Western coupler at any time.

It is respectfully submitted that the question of the Safety Appliance Act is immaterial and irrelevant and the Court properly refused to charge it in any respect.

3. The Courts below did not make a determination, as a matter of law, which was related to an accident occurring on a shipper's tracks as Petitioner suggests in his question Number 1, Page II, Petition.

The question of a "shipper's track" never arose, and never became an issue. The determination of Special Term and of the Appellate Division on the 1961 appeal related to an alleged defective car which had been turned over to another railroad.

At the time (1953) that the Special Term struck the allegation of a violation of the "Federal Safety Appliance Act" (Paragraph Twenty-six, Amended Complaint, Page VIII, Record), the Petitioner was asserting that his employer, Allied Chemical & Dye Corp., was engaged in operating a railroad, and was violating the Federal Safety Appliance Act (Amended Complaint, Paragraphs Thirty-seven, Thirty-eight, Page X, Record).

Accepting the Petitioner's allegations as true, both the Special Term (in 1953) and the Appellate Division (in 1961) correctly ruled out the claim of violation of the Federal Safety Appliance Act, for on the Petitioner's own pleading, the alleged defective car had passed out of the control of Respondent and was in the hands of a receiving railroad. Both the Special Term and the Appellate Division correctly applied the law to Petitioner's Complaint as the record then stood.

4. Petitioner testified on examination before trial in 1952 that the Delaware, Lackawanna & Western car was not defective. Petitioner in 1961 argued his appeal from the 1953 order of Special Term although the Special Term had later in 1953, dismissed the action as against Petitioner's employer.

Petitioner brought the case on for trial in 1963 having made no motion to amend in the 13 years that the case was pending.

Petitioner's failure to plead any defect in the car belonging to his employer, coupled with his failure to show any defect in the car specifically alleged in the Complaint, led directly to the refusal of the Trial Court to charge the Federal Safety Appliance Act and successively to the affirmance of the judgment of the Trial Court by the Appellate Division, and the refusal of the Court of Appeals to grant leave to appeal.

5. The decisions below do not constitute a departure from the law as interpreted by the Supreme Court of the United States, nor do they constitute interpretations in conflict with what the Court might do if presented with a previously unexplored portion of the law.

This case reflects no more than a result mandated by a fatal disparity between the pleadings and the proof.

Since the facts had been known to the Petitioner for 14 years prior to trial, and had been openly spread on the Record for 11 years prior to the trial, Petitioner's failure, for whatever reason, to condemn in his pleadings the car owned by his employer, must be regarded as a calculated position, not one occurring through surprise.

Under the circumstances, the Trial Court quite properly refused to charge as requested and the affirmance by the Appellate Division was proper.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: January 5, 1966.

All of which is respectfully submited,

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